Appendix A

(Opinion of New York Court of Appeals and Concurring Memorandum (23 N.Y. 2d 175))

(PHOTOSTATS)

(See opposite ☛)

APPENDIX A

Statement of Case

CITY OF NEW YORK, Respondent, v. JOHN J. DE LURY, Individually and as President of Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters and Chauffeurs, et al., Appellants.

Argued October 9, 1968; decided November 21, 1968.

Civil service — strikes by public employees — Taylor Law prohibiting strikes by public employees does not deprive union of public employees and its president of due process of law — condemnation of strikes by public employees effectuates valid State policy — prohibition does not violate equal protection clause — public employees and officer of their union are not entitled to jury trial in criminal contempt proceeding — president of union failed to obey court's directive; order adjudging him and union in contempt of court is affirmed.

1. The Taylor Law (Civil Service Law, art. 14, §§ 200–212) prohibiting strikes by public employees does not deprive defendants — a union of sanitation men whose members are employed by plaintiff city and its president — of due process of law. The State, in governing its internal affairs, has the power to prohibit any strike if the prohibition is reasonably calculated to effectuate a valid State policy in an area where it has authority to act.

2. The condemnation of strikes by public employees does effectuate a valid State policy.

3. The prohibition does not violate the equal protection clause. Legislative differentiation between public and private employees, insofar as restrictions on their right to strike and to jury trials are concerned, is reasonable.

4. A jury trial in a criminal contempt proceeding such as this is not available to public employees or to officers of labor organizations representing them charged with violation of the Taylor Law.

5. The individual defendant, president of the union, failed to obey the directive of the court that the strike be terminated and instead urged his men to make the strike 100% effective. The order adjudging defendants union and its president in contempt of court is affirmed.

City of New York v. *De Lury*, 30 A D 2d 781, affirmed.

APPEAL, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered June 20, 1968, which affirmed orders of the Supreme Court at Special Term (SAUL S. STREIT, J.), entered in New York County, granting a motion by plaintiff for a preliminary injunction and adjudging defendants John J. De Lury and the Uniformed Sanitationmen's Association guilty

Points of Counsel

of criminal contempt. The following question was certified: "Were the orders of the Supreme Court, as affirmed by this Court, properly made?"

Paul O'Dwyer, John J. De Lury, Jr., W. Bernard Richland and *Morris Weissberg* for appellants. I. Defendants, although entitled both by statute and as a matter of constitutional right to trial by jury, were tried by a Justice without a jury, in consequence of which the convictions cannot stand. (*People* v. *Duchin*, 12 N Y 2d 351.) II. A trial for criminal contempt is in all respects a criminal prosecution to which all the exacting requirements designed to protect a defendant apply. Those requirements were ignored here. A conviction of criminal contempt can ensue only upon proof of guilt "beyond a reasonable doubt". Moreover, neither a union nor a union officer can be held responsible at law or in equity for unlawful acts in a labor dispute except upon proof "without the aid of any presumption of law or fact" of its or his performance of such acts and of its or his "actual participation in or actual authorization of such acts." Here there was completely absent any direct evidence of such conduct by either appellant Union or by appellant DeLury, the proof falls far short of what was required and the conviction of each was invalid. (*People ex rel. Valenti* v. *McCloskey*, 8 A D 2d 74, 6 N Y 2d 390; *People* v. *Shapolsky*, 8 A D 2d 122; *Mine Workers* v. *Gibbs*, 383 U. S. 715; *Greenberg* v. *Polansky*, 140 App. Div. 326; *Matter of Wegman's Sons*, 40 App. Div. 632; *Matter of Stratton* v. *Wylie*, 3 Misc 2d 518; *Matter of Sheridan* v. *Kennedy*, 12 A D 2d 332; *New York City Tr. Auth.* v. *Loos*, 9 Misc 2d 492; *Yung Jin Teung* v. *Dulles*, 229 F. 2d 244; *Bothner* v. *Keegan*, 275 App. Div. 470.) III. The suspension of Union dues check-off, imposed as a penal sanction, is founded upon a provision of the Taylor Law which exempts New York City from its application until and unless a designated State agency obtains a judicial declaration that the City has not enacted a local law containing provisions "substantially equivalent" to those of the State statute. Since the obtaining of such judicial declaration is entirely discretionary with the State agency, the provision is an unconstitutional delegation of legislative power to impose penal sanctions and the sanctions

which depend for their validity upon that law are invalid. The New York City local law provisions are drastically disparate from those of the State statute, and for this reason, too, the sanction in regard to Union dues check-off is invalid. (*People* v. *Ryan*, 267 N. Y. 133; *Matter of Lyons* v. *Prince*, 281 N. Y. 557; *People* v. *Grant*, 242 App. Div. 310, 267 N. Y. 508; *Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184; *Matter of Levine* v. *O'Connell*, 275 App. Div. 217, 300 N. Y. 658; *Darweger* v. *Staats*, 267 N. Y. 290; *Matter of Cherry* v. *Board of Regents*, 289 N. Y. 148; *Rutherford* v. *Holmes*, 5 Hun 317, 66 N. Y. 368; *People* v. *Albertson*, 242 App. Div. 450; *Matter of Borden* v. *Tobias*, 42 Misc 2d 1069.) IV. The imposition of the maximum penalties of an $80,000 fine and an 18-month suspension of Union dues check-off was arbitrary, illegal and was based upon the totally unsupported findings that the Union made no efforts to terminate the work stoppage and that the City had no role in provoking it. The facts being directly to the contrary, both the fine and the dues check-off suspension were unauthorized. (*Murphy* v. *Hitchcock*, 244 App. Div. 824, 268 N. Y. 636.) The Taylor Law unconstitutionally deprived defendants of due process of law, and of the equal protection of the laws, by prohibiting them from striking, and by compelling them to continue to work for the Government against their will, without making any provision for payment of just compensation for such continued involuntary labor. (*National Protective Assn.* v. *Cumming*, 170 N. Y. 315; *Exchange Bakery & Rest.* v. *Rifkin*, 245 N. Y. 260; *Interborough R. T. Co.* v. *Lavin*, 247 N. Y. 65; *Reinforce* v. *Birney*, 308 N. Y. 164; *Hunt* v. *Crumboch*, 325 U. S. 821; *Arthur* v. *Oakes*, 63 F. 310; *Pollock* v. *Williams*, 322 U. S. 4; *May's Furs & Ready-to-Wear* v. *Bauer*, 282 N. Y. 331; *Automobile Workers* v. *Wisconsin Bd.*, 336 U. S. 245; *Bus Employees* v. *Wisconsin Bd.*, 340 U. S. 383.

J. Lee Rankin, Corporation Counsel (*Frederic S. Nathan*, *William M. Murphy* and *Laurence D. Cherkis* of counsel), for respondent. I. Neither appellant would have been entitled to a jury trial even if a jury had been requested. (*Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 194; *Dyke* v. *Taylor Implement Co.*, 391 U. S. 216; *Goodwins* v. *Hagedorn*, 303 N. Y. 300; *New York City Tr. Auth.* v. *Loos*, 2 Misc

2d 733, 3 A D 2d 740; *New York City Tr. Auth* v. *Loos;* 9 Misc 2d 492; *People ex rel. Frank* v. *McCann,* 253 N. Y. 221; *United States* v. *Barnett,* 376 U. S. 681; *Bradley* v. *O'Hare,* 11 A D 2d 15; *Martin* v. *Curran,* 303 N. Y. 276.) II. The evidence demonstrates beyond a reasonable doubt that De Lury and the Union willfully violated lawful mandates of the court. (*Mount Sinai Hosp.* v. *Davis,* 8 A D 2d 361; *United States* v. *Mine Workers,* 330 U. S. 258; *Manhattan & Bronx Surface Tr. Operating Auth.* v. *Quill,* 48 Misc 2d 1021; *New York City Tr. Auth.* v. *Loos,* 2 Misc 2d 733, 3 A D 2d 740; *Lubliner* v. *Reinlib,* 184 Misc. 472; *United States* v. *International Union, United Mine Workers of America,* 77 F. Supp. 563, 177 F. 2d 29, 338 U. S. 871; *United States* v. *Brotherhood of R. R. Trainmen,* 96 F. Supp. 428; *Portland Web Pressmen's Union* v. *Oregonian Pub. Co.,* 188 F. Supp. 859, 286 F. 2d 4, 366 U. S. 912.) III. The court had power under section 751 (subd. 2) of the Judiciary Law to suspend the Union's dues check-off privilege. That power is not impaired because an administrative agency had statutory authority, which it did not use, to bring a judicial proceeding to seek transfer of that power from the courts to the administrative agency. IV. The imposition of the penalties upon the Union was warranted by the evidence. V. The provisions of the Taylor Law prohibiting strikes by public employees are valid under both the State and Federal Constitutions. (*New York City Tr. Auth.* v. *Loos,* 2 Misc 2d 733, 3 A D 2d 740; *Pruzan* v. *Board of Educ. of City of N. Y.,* 25 Misc 2d 945, 12 A D 2d 923, 9 N Y 2d 911; *City of New York* v. *Social Serv. Employees Union,* 48 Misc 2d 820, 25 A D 2d 953; *Matter of Weinstein* v. *New York City Tr. Auth.,* 49 Misc 2d 170; *Di Maggio* v. *Brown,* 19 N Y 2d 283; *Board of Educ. of City of N. Y.* v. *Shanker,* 54 Misc 2d 941, 29 A D 2d 634; *Tennessee Val. Auth.* v. *Local Union No. 110,* 233 F. Supp. 997; *Amell* v. *United States,* 384 U. S. 158; *National Protective Assn.* v. *Cumming,* 170 N. Y. 315; *Exchange Bakery & Rest.* v. *Rifkin,* 245 N. Y. 260; *Hunt* v. *Crumboch,* 325 U. S. 821.)

Chief Judge FULD. We recently decided, in *Rankin* v. *Shanker* (23 N Y 2d 111), that public employees and labor organizations representing them were not entitled to a trial by jury in a criminal contempt proceeding for the violation of sec-

tion 210 (subd. 1) of the Taylor Law.[1] In so holding, we concluded that a legislative classification "which differentiates between strikes by public employees and employees in private industry" is reasonable and does not offend against the constitutional guarantee of equal protection of the laws (23 N Y 2d, at p. 118). The case now before us calls upon the court to determine, primarily, whether the Taylor Law's mandate that public employees shall not strike and that labor organizations representing them shall not cause or encourage a strike violates due process requirements of the State or Federal Constitution.

At about seven o'clock in the morning of February 2, 1968, virtually all of the sanitation men in the City of New York — employees of the Department of Sanitation — failed, without excuse, to report for work.[2] Later in the day, at a demonstration

1. The Taylor Law was enacted in 1967 (L. 1967, ch. 392; Civil Service Law, art. 14, §§ 200–212) to supersede the Condon-Wadlin Act (L. 1947, ch. 391, adding Civil Service Law, former § 22-a, renum. by L. 1958, ch. 790, as Civil Service Law, former § 108). Like its predecessor, the Taylor Law prohibits strikes by public employees (§ 210, subd. 1) but, unlike Condon-Wadlin, it does not mandate termination of employment for its violation. The Taylor Law grants to all public employees (which, broadly speaking, includes all employees in the service of the State or any subdivision thereof) rights which in the main they did not formerly possess, namely, the right to be represented by employee organizations of their own choosing and the right to negotiate collectively with public employers and, in addition, the right to require public employers to negotiate and to enter into collective agreements with them. It sets up a Public Employment Relations Board — known as PERB — to "resolve • • • disputes concerning the representation status of employee organizations" and to assist in the "voluntary resolution" of disputes between public employers and employee organizations. It also authorizes, under the so-called "home rule" section (Civil Service Law, § 212), the adoption by local governments of "provisions and procedures" which are "substantially equivalent" to those of the Taylor Law. The New York City equivalent of such law is Local Law No. 53 of 1967 but the parties did not utilize the machinery therein provided for resolving disputes between the city and municipal employee organizations. All public employees, whether or not covered by the "home rule" section (§ 212), are subject to the statutory mandate of section 210 (subd. 1) of the Civil Service Law prohibiting them from striking.

2. The City and the Uniformed Sanitationmen's Association had labored long in an attempt to arrive at a new collective agreement to replace one which expired on June 30, 1967. Bargaining between the parties, which commenced in December of 1966, had dragged along for the entire year of 1967 and through January, 1968. On January 31, 1968, a mutually agreed upon mediation panel formulated a settlement agreement which, though accepted by the City, was rejected by the Union stewards.

in front of City Hall, members of the Uniformed Sanitationmen's Association (referred to herein as the "Union") were addressed by their president, the defendant De Lury, in these words:

> "Your sentiments before was go-go-go. I'd accept a motion for go-go-go (cheers). All in favor signify by saying yes (cheers). All opposed (boos). I didn't come here to bargain, I took a firm position with the City, I gave the members a final offer of this union. Now I want to show discipline here this morning—or this afternoon—I don't want to show where there is confusion in the members—You got a job at the locations to see that this is effective 100% (cheers)."

A nine-day strike, ending on the night of February 10, resulted. During that period, few, if any, of the sanitation men reported for work, in consequence of which garbage and refuse accumulated on the city streets at the rate of 10,000 tons a day. This constituted a serious health and fire threat; indeed, the Commissioner of Health characterized the "garbage situation" as "a serious one to the health of the city" and the Fire Commissioner declared that the Fire Department "experienced a marked increase in the number of outside rubbish fires".[3]

On February 2, the very day the work stoppage began, the City instituted the present action to enjoin the defendants from "striking" and moved for a preliminary injunction. A temporary restraining order was granted which enjoined the carrying on of the strike and required the leaders of the Union to instruct the members to return to work. Three days later, on February 5, the court at Special Term granted a preliminary injunction which again contained a directive to De Lury that he shall "forthwith instruct all members [of the Union] not to engage or participate in any strike, concerted stoppage of work or concerted slowdown against the plaintiff." Although, because of the health and fire hazards involved, immediate compliance with the orders was vital, the members of the Union, as previously noted, remained away from their jobs until February 10.

3. On the sixth day of the strike, a volunteer group of some 500 men collected hospital refuse, the accumulation of which created an especially dangerous threat of disease.

An application, brought on by order to show cause, to punish the Union and De Lury for criminal contempt for willfully disobeying the restraining order, came on for hearing before the court; the testimony adduced concerning the strike and its effects, as well as the conduct of De Lury, was substantially as outlined above. When the City, through its Corporation Counsel, stated that it was prepared to call witnesses to establish that the sanitation men " had [not] received instructions from Mr. De Lury to report back to work ", defense counsel conceded that, if witnesses were called to the stand — as the Corporation Counsel proposed — " they would testify that they did not receive any instructions from Mr. De Lury to go back, because Mr. De Lury did not send them out, and Mr. De Lury did nothing to bring them back. These are the facts which are known to everybody. "[4]

At the conclusion of the hearings, the court, dismissing charges which had also been asserted against other officers, found De Lury and the Union guilty of criminal contempt for willfully disobeying its lawful mandate. It sentenced De Lury to 15 days in jail and fined him $250 and it fined the Union $80,000; in addition, the court ordered that the Union's right to dues check-off be forfeited for a period of 18 months.[5] The Appellate Division affirmed Special Term's orders and granted the defendants leave to appeal to our court on a certified question.

We consider, first, the defendants' contention that the Taylor Law is unconstitutional on the ground that, in prohibiting strikes by public employees, it deprives them of due process of law. Manifestly, neither the Fourteenth Amendment to the Federal Constitution nor the Bill of Rights of the State Constitution (art. I) grants to any individual an absolute right to strike. On the contrary, that right is subject to the qualification that, if a strike is for an illegal objective, it is enjoinable at the instance of an aggrieved party. To cull from the opinion of the Supreme Court in *Auto Workers* v. *Wisconsin Bd.* (336 U. S. 245, 259–260), " ' the exercise of the unquestioned right to [strike] ' * * * did not operate to legalize the sit-down strike, which

4. The City was ready to call 10 witnesses, having planned to issue 100 subpœnas addressed to that number of employees.

5. The fines imposed, as well as the period for which the Union's dues check-off rights were forfeited, were the maximum authorized by the applicable statute (Judiciary Law, § 751, subds. 1, 2, par. [a]).

state law made illegal and state authorities punished. [Case cited.] Nor, for example, did it make legal a strike that ran afoul of federal law [case cited]; nor one in violation of a contract made pursuant thereto [case cited]; nor one creating a national emergency [case cited]."

Although acknowledging that the right to strike is not absolute, the defendants would have us read the opinion in the *Auto Workers* case to mean that a prohibition against strikes will be upheld only where workers strike in violation of a no-strike clause or where there is a secondary boycott, violence or a trespass such as a sitdown. There is no basis for so narrowly viewing that decision. The Supreme Court did not limit the doctrine there applied to instances of illegal strikes mentioned by it. Rather, it laid down a general rule, applicable in all cases involving illegal strikes, namely, that the State, in governing its internal affairs, had the power to prohibit *any* strike if the prohibition was reasonably calculated to achieve a valid State policy in an area which was open to State regulation. (Cf. *Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284, 294–295.)

Our query must, therefore, be whether the condemnation of strikes by public employees, as provided in the Taylor Law, does effectuate a valid policy of our State.

For many years, strikes against the Government have been outlawed by special legislation and by common law. Today, no less than 20 States have statutes condemning strikes by some or all of its public employees and at least seven States have achieved the same result by the application of common-law principles. (See Rubin, A Summary of State Collective Bargaining Law in Public Employment, published by Cornell University in 1968.) In addition, a Federal statute specifically provides that strikes by Federal employees are illegal (U. S. Code, tit. 5, § 7311). Substantial reasons are at hand for this almost universal condemnation of strikes by public employees. As Professor George W. Taylor, an outstanding authority in the field of labor relations and one of the architects of the Taylor Law, put it (Public Employment: Strikes or Procedures?, 20 Industrial and Labor Relations Rev. 617, 619),

> "One of the vital interests of the public which should be conserved in the government-employee relationship is the ability of representative government to perform the

> functions of levying taxes and, through the budgeting of governmental resources, of establishing priorities among the government services desired by the body politic."

Quite obviously, the ability of the Legislature to establish priorities among government services would be destroyed if public employees could, with impunity, engage in strikes which deprive the public of essential services. The striking employees, by paralyzing a city through the exercise of naked power, could obtain gains wholly disproportionate to the services rendered by them and at the expense of the public and other public employees. The consequence would be the destruction of democratic legislative processes because budgeting and the establishment of priorities would no longer result from the free choice of the electorate's representatives but from the coercive effect of paralyzing strikes of public employees. (See Final Report [March 31, 1966] of the Governor's Commission on Public Employment Relations [hereafter referred to as the Taylor Report], pp. 15–16).

It was undoubtedly because of such considerations that Governor Thomas E. Dewey, in his Memorandum approving the Condon-Wadlin Act (L. 1947, ch. 391) — the predecessor of the Taylor Law — declared (N. Y. Legis. Ann., 1947, pp. 36–37):

> "The duty of public employees is to the whole of society. A strike of firemen could overnight permit the destruction of a whole city. A strike of police could endanger the safety of millions of people and all their possessions. A strike of sanitation workers could almost overnight produce an epidemic threatening the lives of other millions of people".

And President Franklin D. Roosevelt expressed himself in similar fashion in 1937, some 10 years earlier (Public Papers and Addresses for Year 1937 [1941] Letter of Aug. 16, 1937, p. 325):

> "Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is para-

mount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable."

The courts which have dealt with the constitutional question under discussion have concluded that no provision of either the Federal or State Constitution prevents the State from outlawing strikes by public employees. Thus, our court (*Matter of Di Maggio* v. *Brown*, 19 N Y 2d 283; *Pruzan* v. *Board of Educ.*, 9 N Y 2d 911, affg. 12 A D 2d 923, affg. 25 Misc 2d 945; see, also, *City of New York* v. *Social Serv. Employees Union*, 48 Misc 2d 820), as well as the courts of sister States (see, e.g., *Norwalk Teachers' Assn.* v. *Board of Educ.*, 138 Conn. 269; *Detroit* v. *Division 26 of Amalgamated Assn.*, 332 Mich. 237, app. dsmd. 344 U. S. 805; *Cleveland* v. *Division 268 of Amalgamated Assn.*, 41 Ohio Op. 236), have expressly rejected constitutional objections to legislation prohibiting and punishing strikes by public employees. Indeed, in upholding the constitutionality of the Condon-Wadlin Act in the *Di Maggio case* (19 N Y 2d 283, *supra*), Judge BURKE, writing for a unanimous court, had this to say about that statute (pp. 287–288):

"Petitioners claim that Condon-Wadlin is unconstitutional on its face because it constitutes a bill of attainder, imposes excessive fines and inflicts cruel and unusual punishment. None of these allegations is sustainable. In *Pruzan* v. *Board of Educ.* (9 N Y 2d 911 [1961]) the constitutionality of Condon-Wadlin was at least impliedly asserted. Moreover, it cannot reasonably be said that the law constitutes a bill of attainder, 'a legislative act which inflicts punishment without a judicial trial.' (*Cummings* v. *Missouri*, 4 Wall. [71 U. S.] 277, 323 [1866].) *There is no constitutional provision which vests one with the right to governmental employment, or which bars the imposition of reasonable and necessary limitations and conditions on*

> *such employment.* Consequently, a statute which incorporates such limitations on governmental employment cannot be construed as a bill of attainder. There is numerous authority to the effect that *it is against public policy for public employees to strike,* and many courts have held that such a strike is unlawful, illegal and may be restrained and enjoined." (Emphasis supplied.)

In the case before us, the Legislature, after declaring (Civil Service Law, § 200) that "it is the public policy of the state * * * to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government", recited that such policy is best effectuated by "continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition." Furthermore, the Taylor Report, which preceded the enactment of the Taylor Law, found, after an exhaustive study of the matter, that the right of public employees to strike "is not compatible with the orderly functioning of our democratic form of representative government" (p. 19).

In view of the strong policy considerations which led to the enactment of the Taylor Law, it is our conclusion that the statutory prohibition against strikes by public employees is reasonably designed to effectuate a valid State policy in an area where it has authority to act and that the provisions of subdivision 1 of section 210 do not offend any due process rights of the defendants.

In view of our recent decision in the *Shanker* case (23 N Y 2d 111, *supra*), no extended discussion is required in addressing ourselves to the defendants' point that the prohibition against strikes by public employees (or their representative organizations) violates the equal protection clause of either the United States or the New York State Constitution. (See, for a recent discussion of the problem of equal protection of laws, *Locomotive Firemen* v. *Chicago, R. I. & P. R. R. Co.*, —— U. S. —— [37 U. S. Law Week 4032, decided Nov. 18, 1968]; *New York Cent R. R. Co.* v. *Lefkowitz*, 23 N Y 2d 1.) As we had occasion to observe in *Shanker* (23 N Y 2d, at p. 116),

> "Ever since the enactment of the Norris-LaGuardia Act and our State's Little Norris-LaGuardia Act, the view has been uniformly and consistently held that a legitimate distinction between public and private employment is constitutionally permissible. This has been recognized * * * with regard not only to the prohibition against strikes but also to the issue, now confronting us, affecting jury trials."

There are a number of factual differences between employment in the public and private sectors which furnish reasonable justification for disparate treatment vis-à-vis the right to strike. Thus, for instance, the necessity for preventing goods or services being priced out of the market may have a deterrent effect upon collective bargaining negotiations in the private sector, whereas, in the public sector, the market place has no such restraining effect upon the negotiations and the sole constraint in terms of the negotiations is to be found in the budget allocation made by responsible legislators. Again, the orderly functioning of our democratic form of representative government and the preservation of the right of our representatives to make budgetary allocations—free from the compulsions of crippling strikes—require the regulation of strikes by public employees whereas there is no similar countervailing reason for a prohibition of strikes in the private sector. (See Taylor Report, pp. 15–16.) Nor does the fact that many employees in private industry also perform vital services render the distinction unreasonable. As to this, it is sufficient to note that, although the Legislature is not barred from enacting laws regulating the relationship between the State or its subdivisions and public employees, it cannot regulate labor relations in the private sector with respect to most industries (e.g., privately owned railroads, airlines, etc.) where a strike could paralyze a city without, as we observed in the *Rankin* case, running into conflict with Federal legislation, such as the National Labor Relations Act and the Railway Labor Act, and thereby violating "the exclusive primary jurisdiction of Federal administrative agencies vested with the authority to deal with such matters" (23 N Y 2d, at p. 118, n. 3).

In view of the basic differences between public and private employment, it may not be said that a classification which pro-

hibits strikes by public employees while failing to legislate against strikes by employees in the private sector is unreasonable, especially when it is considered that strikes by public employees, unlike private employees, have always been subject to injunctions by the courts. Consequently, we conclude here, just as we did in *Rankin* (p. 119) that, "as of the present [time], legislative differentiation between public and private employees, insofar as restrictions on their right to strike and to jury trials are concerned, is reasonable."

The defendants' argument — that they are entitled to a trial by jury despite their failure to request one — may be disposed of summarily. In our decision in *Rankin* v. *Shanker* (23 N Y 2d 119, *supra*), as the lines already quoted from the opinion in that case establish, we expressly held that a jury trial in a criminal contempt proceeding such as this (under Judiciary Law, § 753-a and Labor Law, § 808) is not available to public employees, or to officers of labor organizations representing them, charged with violation of the Taylor Law (Civil Service Law, § 200 *et seq.*). This, of course, applies equally to the present defendants.

Nor is there any substance to the further contention that the city failed to prove there is evidence that De Lury disobeyed any mandate of the court. The strike was open and notorious. Its devastating impact on the City of New York and its inhabitants, including the danger of fire and the hazard to health, was known to the defendant, as it was to all New Yorkers. The court's order that the strike be terminated and that De Lury, as president of the Union, instruct his men "not to engage or participate in" the strike was clear beyond cavil. The defendant not only failed to obey that injunction but, going to the other extreme, actually urged the men to make the strike "effective 100%". What the proof convincingly demonstrated, the concession of the defendant's counsel rendered indisputable. We cannot accept the highly technical or hair-splitting arguments urged upon us in an attempt to evade compliance with the court's lawful mandates. Indeed, when confronted with a somewhat similar situation in *United States* v. *Mine Workers* (330 U. S. 258, 307, concurring opn.) — a case in which an adjudication of criminal contempt was based on disobedience of an order enjoin-

ing a strike — Mr. Justice FRANKFURTER, after observing that we are "'a government of laws and not of men'" (p. 307), went on to say in language most appropriate here (p. 312):

> "In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it."

We have considered each of the other arguments advanced by the defendants and find them so tenuous as to require no comment.

In conclusion, then — subdivision 1 of section 210 of the Civil Service Law, designed to prevent the paralysis of Government, offends against no constitutional guarantee or requirement. Self-interest of individual or organization may not be permitted to endanger the safety, health or public welfare of the State or any of its subdivisions. There was here indisputable proof not only of deliberate disobedience of the explicit provisions of the Taylor Law but willful defiance of the court's lawful mandates as well. Such defiance, the more egregious when committed by employees in the public sector, is not to be tolerated.

The order appealed from should be affirmed, with costs, and the question certified answered in the affirmative.

Opinion by Chief Judge FULD. All concur, Judges BURKE, BERGAN and KEATING on constraint of this court's decision in *Rankin* v. *Shanker* (23 N Y 2d 111) insofar as the right to a jury trial is concerned.

Appendix B

(MAJORITY AND DISSENTING OPINIONS OF NEW YORK COURT OF APPEALS IN *Rankin* v. *Shanker* (23 N.Y. 2d 111))

(PHOTOSTATS)

(See opposite ☛)

Statement of Case

J. LEE RANKIN, Corporation Counsel of the City of New York, on Behalf of the Board of Education of the City of New York, Respondent, *v.* ALBERT SHANKER, Individually and on Behalf of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, et al., Appellants.

J. LEE RANKIN, Corporation Counsel of the City of New York, on Behalf of the Board of Education of the City of New York, Respondent, *v.* ALBERT SHANKER, Individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, et al., Defendants, and WALTER J. DEGNAN, Individually and as President of the Council of Supervisory Associations, et al., Appellants.

Argued October 29, 1968; decided October 30, 1968.

Contempt — criminal contempt — jury trial — public employees and unions which represent them are not entitled, as matter of right, to jury trial in criminal contempt proceeding brought for alleged violation of Taylor Law in that they engaged in strike or instigated, encouraged or condoned the strike.

1. Public employees and the unions which represent them are not entitled, as a matter of right, to trial by jury in a criminal contempt proceeding brought against them for alleged violation of the Taylor Law (L. 1967, ch. 392; Civil Service Law, art. 14, §§ 200–212), in that the employees engaged in a strike and the organizations instigated, encouraged or condoned such strike.

2. Section 753-a of the Judiciary Law and section 808 of the Labor Law grant the right of jury trial in a proceeding to punish, as a criminal contempt, a failure or refusal to obey an injunction order granted "in any case involving or growing out of a labor dispute". The Legislature did not intend to apply those sections to strikes by public employees.

3. To refuse a trial by jury to public employees or their representative organizations and to grant it to those in private industry does not deny the equal protection of the laws under the Constitution of either the United States or New York State. A distinction between public and private employment is constitutionally permissible.

4. The Federal Constitution (art. III, § 2; 5th, 6th, 14th Amdts.) does not require that defendants be accorded a trial by jury in a contempt proceeding where the maximum term of imprisonment authorized is 30 days. (*Bloom* v. *Illinois*, 391 U. S. 194, distinguished.)

Rankin v. *Shanker*, 30 A D 2d 956, affirmed.

APPEAL in each of the above-entitled cases, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered October

Points of Counsel

24, 1968, which affirmed an order of the Supreme Court (FRANCIS J. BLOUSTEIN, J.), entered in New York County, denying motions by defendants for a jury trial in a proceeding to punish them for a criminal contempt of court. The following question was certified: "Whether or not Judiciary Law § 753-a(1), or Labor Law § 808, or Article I, Section 2 of the Constitution of the State of New York, or the 14th Amendment of the United States Constitution guarantees the right to a jury trial in a criminal contempt proceeding for an alleged violation of a Court order made pursuant to Civil Service Law § 211."

Ralph R. Katz, Ernest Fleischman, Stephen F. Gordon and *Martin R. Ganzglass* for Albert Shanker and another, appellants. I. Section 753-a of the Judiciary Law and section 808 of the Labor Law give defendants the right to a jury trial. (*Brown* v. *State of Maryland*, 12 Wheat. [25 U. S.] 419; *Goodwins* v. *Hagedorn*, 303 N. Y. 300; *New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 3 A D 2d 740; *New York City Tr. Auth.* v. *Loos*, 9 Misc. 2d 492; *Manhattan & Bronx Surface Tr. Operating Auth.* v. *Quill*, 48 Misc 2d 1020; *People ex rel. Choate* v. *Barrett*, 121 N. Y. 678; *Matter of Savin*, 131 U. S. 267.) II. The Federal Constitution and decisions of the United States Supreme Court require that defendants be granted a jury trial in the contempt proceeding. (*Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 194; *Cheff* v. *Schnackenberg*, 384 U. S. 373.) III. Under the Constitution of the State of New York defendants have a right to a trial by jury. (*Matter of Leary*, 175 Misc. 254; *Matter of Werner* v. *Reid*, 260 App. Div. 1000; *Matter of Leary*, 285 N. Y. 693; *People ex rel. Wood* v. *Draper*, 15 N. Y. 532.) IV. The denial of a jury trial to defendants would constitute a constitutional deprivation of the equal protection of the laws. (*Griffin* v. *Illinois*, 351 U. S. 12; *Rapid Tr. Corp.* v. *New York*, 303 U. S. 573; *Queensboro Farms Prods.* v. *Wickard*, 137 F. 2d 969.) V. A discrimination between private and public employees with respect to the right to a trial by jury for a contempt growing out of a labor dispute is a denial of equal protection of the laws because there is no reasonable and just relationship between such a distinction and the purpose of the provision establishing the right to a trial by jury. (*Morey* v. *Doud*, 354 U. S. 457; *Myer* v. *Myer*, 271 App. Div. 465; *Thompson* v. *Shapiro*, 270 F. Supp. 331.)

Opinion per Chief Judge FULD

Max H. Frankle, Everett E. Lewis and *Bernard Yaker* for Walter J. Degnan and others, appellants. I. The court below erred in denying defendants-appellants a jury trial on criminal contempt charges. (*Matter of Tonis* v. *Board of Regents*, 295 N. Y. 286; *New York State Bridge Auth.* v. *Moore*, 299 N. Y. 410; *Matter of Bailey* [*Bush Term. Co.*], 265 App. Div. 758, 291 N. Y. 534; *Dwight* v. *Enos*, 9 N. Y. 470; *People* v. *Dethloff*, 283 N. Y. 309; *Anderson* v. *Mather*, 44 N. Y. 249; *Owners & Tenants Elec. Co.* v. *Tractenberg*, 158 Misc. 677; *Matter of Hering* v. *Clement*, 133 App. Div. 293, 196 N. Y. 218; *People ex rel. Woodbury* v. *Hendrick*, 215 N. Y. 339.) II. The Federal Constitution mandates a jury trial in the criminal contempt proceeding herein. (*Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 144; *United States* v. *United Mine Workers*, 330 U. S. 258.)

J. Lee Rankin, Corporation Counsel (*Frederic S. Nathan, William M. Murphy* and *Laurence D. Cherkis* of counsel), for respondent. I. Defendants' demands for a jury were properly rejected in a criminal contempt trial for willful disobedience of a court order issued pursuant to the Taylor Act enjoining a strike by public employees against the Government. (*Dyke* v. *Taylor Implement Co.*, 391 U. S. 216; *DeStefano* v. *Woods*, 392 U. S. 631; *Bradley* v. *O'Hare*, 11 A D 2d 15; *Martin* v. *Curran*, 303 N. Y. 276; *Ostrom* v. *Greene*, 161 N. Y. 353; *Ex parte Wilson*, 114 U. S. 417; *People* v. *Bellinger*, 269 N. Y. 265; *Matter of McKinney* v. *Hamilton*, 282 N. Y. 393; *United States* v. *United Mine Workers*, 330 U. S. 258; *Jewish Hosp. of Brooklyn* v. *"John Doe"*, 252 App. Div. 581.)

Chief Judge FULD. These appeals require us to pass upon a fundamental question of high importance in connection with the enforcement of the provisions of the recently enacted Taylor Law (L. 1967, ch. 392; Civil Service Law, art. 14, §§ 200–212). Are public employees or the unions which represent them entitled, as a matter of right, to trial by jury in a criminal contempt proceeding brought against them for alleged violation of section 210 (subd. 1) of that statute, in that (as to the employees) they engaged in a strike and (as to the organizations) they instigated, encouraged or condoned such strike?

Opinion per Chief Judge FULD

In the present case, the Corporation Counsel of the City of New York sought an order — pursuant to section 211 of the Civil Service Law and sections 750 and 751 of the Judiciary Law — to punish the defendants for criminal contempt, claiming that they had willfully disobeyed the restraining provisions of the temporary injunction issued by the Supreme Court on September 9, 1968. The defendants' demand for a trial by jury, based on their claim that they are entitled to such a trial as a matter of right by virtue of statutory and constitutional provisions, was rejected by Special Term, and its resulting orders were unanimously affirmed by the Appellate Division. The appeals are before us by leave of the latter court on certified questions.

The statutory provisions on which the several defendants rely are section 753-a of the Judiciary Law and section 808 of the Labor Law (formerly Civ. Prac. Act, § 882-a). Those sections, in substantially identical language, grant the right of jury trial in a proceeding to punish, as a criminal contempt, a failure or refusal to obey an injunction order granted "in any case involving or growing out of a labor dispute". It is urged by the defendants that the legislative design to apply those sections to strikes by public employees (§ 210, subd. 1) is demonstrated by the fact that, whereas the Legislature expressly provided that section 807 of the Labor Law[1] is inapplicable to injunctions to restrain violations of section 210 (subd. 1), no similar exclusionary language applies to section 808. We find no substance to this argument.

Our discussion of the statutory question may well begin by noting that a primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature. In finding such purpose, one should look to the entire statute, its legislative history and the statutes of which it is made a part. (See, e.g., *Matter of Hogan* v. *Culkin*, 18 N Y 2d 330, 335; *Levine* v. *Bornstein*, 4 N Y 2d 241, 244; see, also, McKinney's Cons. Laws of N. Y., Book 1, Statutes, §§ 92, 95, 96, 97, 98, 111.)

1. This section restricts or limits the issuance of injunctions in "labor dispute" cases. Section 807 (formerly Civ. Prac. Act, § 876-a) and section 808 (formerly Civ. Prac. Act, § 882-a) are counterparts of the Norris-LaGuardia Act (47 U. S. Stat. 70; U. S. Code, tit. 29, §§ 101-115; also U. S. Code, tit. 18, § 3692).

Section 807 and section 808 of the Labor Law (as well as Judiciary Law, § 753-a) are but the identically worded successors of a statutory provision enacted in the 1930s which constituted this State's Little Norris-LaGuardia Act (Civ. Prac. Act, § 876-a), named for its Federal prototype, the Norris-LaGuardia Act (47 U. S. Stat. 70; U. S. Code, tit. 29, §§ 101–115). Accordingly, in determining the reach of the new statutes, we find it highly significant that for the past three decades their predecessors have been held inapplicable to public employees. More specifically, the courts have ruled that such provisions — both those restricting or limiting the issuance of labor injunctions and those granting the right of trial by jury in criminal contempt proceedings involving labor disputes — apply solely to employees in private industry and not to those in public employment. (See *United States* v. *Mine Workers*, 330 U. S. 258, 298; *Jewish Hosp. of Brooklyn* v. *"John Doe"*, 252 App. Div. 581, 585; see, also, *New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 742, affd. 3 A D 2d 740; *New York City Tr. Auth.* v. *Loos*, 9 Misc 2d 492, 493.) It is overly simplistic reasoning to assume that the Legislature, in excluding the provisions of section 807 from the application of the Taylor Law, but failing similarly to mention section 808, intended to grant the right of trial by jury to public employees, a right which they had never previously possessed under the latter section.

If it had been the design of the Legislature to grant such a right, that body would undoubtedly have done so expressly and unequivocally. There is nothing in the provisions under consideration relating to jury trials (Labor Law, §§ 807, 808; Judiciary Law, § 753-a) which discloses any concern with, or application to, public employment. In point of fact, when we look to the legislative history which preceded and accompanied the enactment of the Taylor Law, there is no suggestion that any one, in or out of the Legislature, proposed trial by jury in contempt proceedings for its violation. It is inconceivable, we suggest, that so vital and salient a feature would not have been enacted, let alone not mentioned, by the Legislature if there had been any design or desire to provide therefor. To accept the position of our dissenting brothers would ascribe to the Legislature an intention not only to

override decisions on the books for upwards of 30 years, which denied the right to trial by jury to public employees (see *supra*, p. 115), but also to nullify the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." (*United States* v. *Mine Workers*, 330 U. S. 258, 272, *supra*.)

The conclusion, therefore, is clear. The Taylor Law was never intended to, and does not, make provision for jury trials in contempt enforcement proceedings; the reference in the Taylor Law to section 807 cannot possibly create a right to a jury trial under section 808.

Nor do we find any basis for a claim that a denial of a jury trial in this case offends against any constitutional provision. Contrary to the defendants' contention, to refuse a trial by jury to public employees or their representative organizations and to grant it to those in private industry does not violate the equal protection of the laws under the Constitution of either the United States or New York State. Ever since the enactment of the Norris-LaGuardia Act and our State's Little Norris-LaGuardia Act, the view has been uniformly and consistently held that a legitimate distinction between public and private employment is constitutionally permissible. This has been recognized, we note, with regard not only to the prohibition against strikes but also to the issue, now confronting us, affecting jury trials. (See *United States* v. *Mine Workers*, 330 U. S. 258, 298, *supra*; *Jewish Hosp. of Brooklyn* v. "*John Doe*", 252 App. Div. 581, 585, *supra*; see, also, *New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 742, affd. 3 A D 2d 740, *supra*; *New York City Tr. Auth.* v. *Loos*, 9 Misc 2d 492, 493, *supra*.) Indeed, the Supreme Court, explicitly dealing with the problem in the *Mine Workers* case — where the miners were governmental employees — declared (330 U. S., at p. 298):

> "Not only were the defendants fully informed that a criminal contempt was charged, but we think they enjoyed during the trial itself all the enhanced protections accorded defendants in criminal contempt proceedings. We need not treat these at length, for defendants, in this respect, urge only their right to a jury trial as provided in § 11 of the

Norris-LaGuardia Act. But § 11 is not operative here, for it applies only to cases 'arising under this Act,' and we have already held that the restriction upon injunctions imposed by the Act do not govern this case. The defendants, we think, were properly tried by the court without a jury."

There is at least one vital reason why a jury trial is not appropriate or desirable in applying sanctions for violation of statutes regulating labor relations with public employees or their representative organizations. Prompt determinations, unencumbered by the long, drawn-out procedures involved in jury trials, are needed in criminal contempt proceedings under the Taylor Law in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the offenders.[2] It is not unreasonable to assume that the Legislature, which prohibited strikes by public employees, would provide every reasonable means for enforcement of that prohibition by giv-

2. Under the Judiciary Law (§ 751, subd. 2, par. [d], cl. [i]), a labor organization appealing an adjudication and fine for criminal contempt is not required to pay the fine until the appeal has been finally determined. Based on that provision, it is urged in the dissenting opinion of Judge KEATING (p. 133) that the Legislature sanctions delay in carrying out the punishment imposed on unions in such contempt proceedings and, hence — to quote from the dissent — "the purported justification [mentioned in the court's opinion] for denying a jury trial has no application at all." However, what the dissent overlooks is the further provision of the Judiciary Law (§ 751, subd. 2, par. [d], cl. [ii]) which, in order to reduce to a minimum delays due to appeals, requires the appellate courts to "grant a preference in the hearing thereof." No similar grace period pending appeal is granted to union leaders for commencement of imprisonment for contempt, and in at least one of New York City's recent major strikes in the public sector the leader was imprisoned during the continuation of the strike. That the Legislature intended the courts to utilize the criminal contempt proceedings as a means of promptly putting an end to illegal strikes by public employees is likewise apparent from the following statement contained in the Final Report (March 31, 1966) of the Governor's Committee on Public Employee Relations which led to the enactment of the Taylor Law (p. 43): "To this end [namely, the termination of illegal strikes in violation of section 210 of the Civil Service Law] we recommend that it may be made obligatory by law for specified law officers to initiate court action for injunctive relief before any strike breaks out as soon as it can be proven that it is about to occur, and if the resulting order or decree of the court is violated *to institute a criminal contempt proceeding promptly.*" (Emphasis supplied.)

ing the courts the powers necessary to bring about their early termination. Such strikes, if caused by firemen, could "overnight permit the destruction of a whole city", or if by policemen could "endanger the safety of millions of people and of all their possessions", or if called by sanitation workers could "almost overnight produce an epidemic threatening the lives of other millions of people." (Memorandum of Governor Dewey, approving Condon-Wadlin Act [L. 1947, ch. 391], N. Y. Legis. Ann., 1947, pp. 36–37.) And, we would add, if called by teachers in the New York City public school system, such strikes would not only deprive children of their fundamental and statutory right to a basic education — thereby severely handicapping them in their efforts to attain higher education and future employment — but it would also impair their respect for law.

Strikes by employees in certain private industries may, as Judge KEATING notes in dissent (opn., p. 134), be just as paralyzing in their impact upon the public as strikes by workers in public employment. But the Legislature has not seen fit to legislate with regard to such strikes.[3] And, just as a classification is not deemed unreasonable which differentiates between strikes by public employees and employees in private industry,[4]

3. Our Legislature, distinguishing between "private" and "public" employees, has refrained from enacting laws prohibiting strikes — which might have a crippling effect on a city — by employees of private utilities, privately owned railroads, shipping lines and other similar private industries. The Legislature's failure to act in the private sector is undoubtedly due to the fact that such provisions might conflict with Federal legislation, such as the National Labor Relations Act (U. S. Code, tit. 29, § 151 *et seq.*) and the Railway Labor Act (U. S. Code, tit. 45, § 151 *et seq.*) and might thereby violate the exclusive primary jurisdiction of Federal administrative agencies vested with the authority to deal with such matters. (See, e.g., *San Diego Unions* v. *Garman*, 359 U. S. 236.)

4. The policy reasons for distinguishing between public and private employees are succinctly set forth in the afore-mentioned Final Report of the Governor's Committee on Public Employee Relations (pp. 18–19): "Careful thought about the matter [that is, the distinction between strikes by public and private employees] shows conclusively, we believe, that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative polical power is the final determinant)."

so a classification may not be subjected to attack which denies a jury trial to public employees whose willful defiance of the prohibition against strikes, if not brought to an immediate end (without the delay occasioned by possibly long, drawn-out jury trials), might cripple a city. As the Supreme Court not too long ago had occasion to observe (*McGowan* v. *Maryland*, 366 U. S. 420, 425–426):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. *The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.* State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (Emphasis supplied.)

Certainly, a reasonable distinction may be drawn between public and private employment; reasonableness of a classification under constitutional standards is always influenced by time and circumstances. It is sufficient to note that, as of the present, legislative differentiation between public and private employees, insofar as restrictions on their right to strike and to jury trials are concerned, is reasonable.

The defendants' further contention that the Federal Constitution (art. III, § 2; 5th, 6th, 14th Amdts.) requires that they be accorded a trial by jury is likewise without merit. *Bloom* v. *Illinois* (391 U. S. 194), contrary to the defendants' argument, does not stand for the proposition that the Fourteenth Amendment guarantees the right to a jury trial in every contempt proceeding in State courts. The decision in *Bloom* is plainly limited in its application to "serious" crimes in contradistinction to "petty" offenses (e.g., p. 197; see, also, *Dyke* v. *Taylor Implement Co.*, 391 U. S. 216, 220; *DeStefano* v. *Woods*, 392 U. S. 631, 633). In the *Dyke* case (391 U. S. 216, *supra*), for instance, the Supreme Court, after observing that it had not drawn a precise line "between punishments that can be

considered 'petty' and those that cannot be", went on to say that "it is clear"—from its decision in *Cheff* v. *Schnackenberg* (384 U. S. 373)—"that a six-month sentence is short enough to be 'petty.'" In the case before us, it is sufficient to point out that the maximum punishment to which the individual defendants are subject—if found guilty—is 30 days in jail and a fine of $250 (Judiciary Law, § 751, subd. 1).

Nor does the penalty to which defendant unions are subject—a fine of $10,000 a day or one fifty second (1/52) of the total amount of annual membership dues, "whichever is the lesser" (Judiciary Law, § 751, subd. 2, par. [a])[5]—render the contempt a "serious" crime. The determination, whether it is serious or petty under the decisions, turns not on the amount of the fine which may be imposed but solely on the length of the prison sentence. (See *Ex parte Wilson*, 114 U. S. 417, 428; *People* v. *Bellinger*, 269 N. Y. 265, 271; *Matter of McKinney* v. *Hamilton*, 282 N. Y. 393, 397.) Consequently, as the cases reveal, the fine, even though sizeable in amount,[6] furnishes no valid criterion for the defendants' claim that the contempt charged against them constitutes a serious crime. Further, even if the amount of the permissible fine had any relevance, the fine—which in the last analysis must be borne by the union membership (see, e.g., *Martin* v. *Curran*, 303 N. Y. 276, 281)—is actually small, amounting, at most, to no more than a member's weekly union dues for each day of the contempt.

In sum, then, we find that no constitutional or statutory right of the defendants will be transgressed by a trial of the criminal contempt charge without a jury.

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5. It is also asserted that, in dealing with the question whether a serious crime is here involved, this court should consider that the labor organizations may be compelled to forfeit their membership dues deduction privileges for a period not to exceed 18 months (Civil Service Law, § 210, subd. 3 par. [f]). Since no action has been taken by any governmental official, as required by section 210 of the Civil Service Law, and none can result from the present contempt proceedings, the fact that such forfeiture may occur at some future date has no relevance to the question now before us.

6. It should be noted, in passing, that, although a fine of $700,000 was imposed on defendant labor organization in *United States* v. *Mine Workers* (330 U. S. 258, *supra*), the Supreme Court held that the defendant had no right of trial by jury. And in *Cheff* v. *Schnackenberg* (384 U. S. 373, *supra*), a demand for a jury trial was held properly denied in a criminal contempt case even though one of the defendants had been fined $100,000.

The orders appealed from should be affirmed, without costs, and the questions certified answered in the negative.

BURKE, J. (dissenting). The order seeking to place these defendants in contempt is predicated on the Public Employees' Fair Employment Act, more popularly known as the Taylor Act (Civil Service Law, §§ 200–212), and article 19 of the Judiciary Law (Judiciary Law, §§ 750–781). Section 210 of the Taylor Act specifically provides that a public employee who condones, causes or instigates a strike " shall be subject to the disciplinary penalties provided by law for misconduct, *in accordance with procedures established by law.*" (Civil Service Law, § 210; emphasis added.) Such procedures are contained in the Judiciary Law and Labor Law. The defendants have demanded a trial by jury in this matter, contending that such a trial is available to them as a matter of right by virtue of various statutory provisions (Judiciary Law, § 753-a; Labor Law, § 808), and that a denial of a trial by jury would be unconstitutional. For the reasons stated below, I am of the opinion that a trial by jury is mandated in this instance.

In support of their contention that they have a statutory right to a trial by jury, defendants rely in part upon section 753-a of the Judiciary Law. It is there stated, in clear and unequivocal terms, that: " Notwithstanding any inconsistent provision of law, where the alleged contempt is punishable under section seven hundred fifty and/or section seven hundred fifty-three and arises out of a failure or refusal to obey any mandate of a court contained in or incidental to an injunction order granted by such court in any case involving or growing out of a labor dispute, no punishment, prescribed by either of such sections, shall be meted out except after a trial by jury to which the defendant shall be entitled as a matter of right ". Whether that provision is here applicable depends on three factors: first, is the contempt here punishable under either of the above-mentioned sections; second, did this injunction involve or grow out of a labor dispute; finally, is the punishment sought prescribed by either section. Since the order seeking to place these defendants in criminal contempt is predicated on section 750 of the Judiciary Law, it is axiomatic that the first and third requirements of section 753-a are indeed satisfied in this case. The sole basis for denying a jury trial under this section is to

conclude that the injunction involved did not arise from a labor dispute.[1] The court below has relied upon decisions from lower courts in this State which, while construing other statutes in a different era, have held that there can be no labor dispute within the meaning of particular statutes where public employees are involved. Since it is not disputed that, absent such an interpretation of section 753-a, the court would determine that a labor dispute did in fact exist in this situation, I merely conclude that under section 753-a of the Judiciary Law defendants are given an unqualified right to a trial by jury in this instance, *notwithstanding any inconsistent provisions of law.*

A parallelism is drawn between section 753-a of the Judiciary Law and sections 807 and 808 of the Labor Law in an effort to sustain the contention of the Corporation Counsel that a "labor dispute" cannot exist under the Judiciary Law, when public employees are involved. Sections 807 and 808 of the Labor Law comprise an article in themselves entitled "Injunctions in Labor Disputes". Of these two sections, only 807 has been held not to apply to public employees; the one case purporting to reach that same conclusion under section 808 does so merely by dictum, has never been followed, and was not the source of any significant commentary. (*New York City Tr. Auth.* v. *Loos,* 9 Misc 2d 492.)

Section 807 provides in effect that no injunction or restraining order involved in or growing out of a labor dispute shall be issued until a hearing has been held. This section's predecessor, like the predecessor of section 753-a of the Judiciary Law, was enacted in 1935. Shortly thereafter, the New York Labor Relations Act was enacted. (Labor Law, §§ 700–716.) In that act, the Legislature specifically declared that its provisions were not to apply to either public employees or employees of nonprofitmaking hospitals (Labor Law, § 715). The very year

1. Labor dispute, within the meaning of section 753-a, is defined in that section in the following manner: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee."

that act was enacted, the Appellate Division had before it the case of *Jewish Hosp. of Brooklyn* v. *"John Doe"* (252 App. Div. 581), wherein the sole question was whether the predecessor of section 807 applied to a charitable corporation such as the Jewish Hospital. The court in holding 807 inapplicable began by summarizing the various maxims of construction pertaining to the State and its political subdivisions to show that section 807 might not apply as these entities were not specifically included, despite the statute's encompassing terms. The court proceeded by demonstrating how the legislative purpose behind granting a hearing prior to the issuance of a restraining order had no relation to charitable corporations and their employees. Finally, the court relied upon the provisions in the Labor Relations Act. "Both statutes should be read together and reconciled as far as possible in an effort to read the mind of the Legislature. [Citations omitted.] In enacting both statutes the Legislature recognized labor's right to strike and to resort to peaceful picketing and other lawful activities free from interference by the courts * * * The Labor Relations Act —unlike the instant statute—expressly provides it shall not apply 'to employees of the State * * * or to employees of charitable, educational or religious associations or corporations'" (252 App. Div. 581, 586). This same rationale produced a similar decision in *New York City Tr. Auth.* v. *Loos* (2 Misc 2d 733): "The procedural requirements of section 876-a of the Civil Practice Act [now Labor Law, § 807] have no application to these public employees. Also, the individual defendants plainly have no rights under the State Labor Relations Law for section 715 of the Labor Law specifically provides that such act shall not apply to public employees generally [citations omitted]" (p. 742). Finally, in a recent decision involving the biennial confrontation with the Transport Workers Union, it was stated: "It has been settled that 'public employees' can and should be enjoined from striking and that the provisions of section 807 are not applicable to such employees." (*Manhattan & Bronx Surface Tr. Operating Auth.* v. *Quill*, 48 Misc 2d 1021, 1022.)

Each of these decisions is inapplicable to the present litigation. Each decision recognizes that, where employees are prohibited from striking, it is indeed improvident to require a time-

consuming hearing before a restraining order may be issued against the acknowledged illegal strike. Thus, it is no mere accident that the Legislature, in enacting the Taylor Act, devoted a separate section to the application for injunctive relief. (Civil Service Law, § 211.) This new section not only reflects the holdings of the cases mentioned above but is also compatible with the general purpose of the act—"to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." (Civil Service Law, § 200.) It does not follow, the cases do not so hold, and the Taylor Act does not so provide, that the public interest is also served by denying public employees the right to a trial by jury. Moreover, before the Taylor Act was adopted, the Legislature, in 1963, made several amendments to the State Labor Relations Law, with the explicit intention of conferring rights upon the employees in nonprofitmaking hospitals. (See, e.g., Labor Law, §§ 715–716.) Thus, the underlying reason for the rule in both *Jewish Hospital* and *Loos* (*supra*) has been overturned by the Legislature, and the decisions have been effectively overruled. It is, therefore, error to declare, as the court below has done, that since the Legislature "must have been aware of the prior judicial interpretation of those sections as not embracing disputes involving public employees, the Legislature may be taken to have acquiesced in that interpretation."[2]

Section 808 of the Labor Law is admittedly similar in language to section 753-a of the Judiciary Law. This marked uniformity between the statutes, when coupled with the decision in *New York City Tr. Auth. v. Loos* (9 Misc 2d 492, *supra*), is said to provide a precedent for the denial of the trial by jury in this case. In *Loos*, the court stated that neither section 808 nor

2. *United States* v. *Mine Workers* (330 U. S. 258), relied upon by the majority in this case involving the Taylor Act, dealt only with the Norris-LaGuardia Act and had no direct bearing on any of the decisions of the New York courts discussed above. As I will indicate later, the Supreme Court's decision was limited in its scope, and clearly failed to consider the question of equal protection of the law. Moreover, the defendants in that case waived the right to an advisory jury (*supra*, p. 268). It is also significant that the one short passage set forth in the majority opinion includes the entire discussion of trial by jury albeit the opinions therein exceeded 120 pages.

section 753-a confers a right to a trial by jury where the "labor dispute" is between public employees and their government. However, in that case, the court concluded that there was no evidence on which the defendant could be adjudged guilty of contempt. Hence, the question of whether a jury trial was required, while discussed by that court, was not instrumental in the court's decision. Moreover, the sole basis for suggesting that there is no statutory basis for a jury trial for a contempt by public employees was the previous decision in *Loos*, which dealt with the necessity of a hearing prior to the issuance of a restraining order (2 Misc 2d 733, *supra*). As the Legislature in 1963 conferred rights upon certain public employees, thereby negating the holding in the first *Loos* decision, it follows that any extension of the *Loos* rationale was also negated. This is confirmed by an analysis of specific provisions of the Taylor Act.

The act begins by reciting that "The Legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees". (Civil Service Law, § 200.) Following a section devoted to the definition of the terms of the act, there are two sections conferring upon the public employee the right to organize and the right to be represented for purposes of collective bargaining "with their public employers". (Civil Service Law, §§ 202, 203.) It is thus abundantly clear that the purpose of the Taylor Act was to enlarge the rights of public employees and to acknowledge the existence of an employer-employee relationship in the area of public employment. It is readily apparent that this new approach to the status of a public employee is totally inapposite to the philosophy prevailing at the time of the *Loos* and *Jewish Hospital of Brooklyn* decisions. It is undisputed that the Taylor Act acknowledges the applicability of the

Judiciary Law when injunctions are to be enforced. "If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law." (Civil Service Law, § 2[3]) It is apparent that this reference to the Judiciary Law was directed to all of article 19. It is also apparent, from all of the above, that the injunction in this case is one "involving or growing out of a labor dispute" within the meaning of section 753-a of the Judiciary Law. The alternative conclusion, adopted today, implies that the Legislature in enacting the Public Employees' Fair Employment Act intended section 753-a of the Judiciary Law to apply to that act, except where public employees are involved.

The Taylor Law, through its reference to the Judiciary Law, clearly intended that public employees and their representatives should have the right to a trial by jury in the present situation. Just as the amendments to the Labor Relations Law evidence an intent to increase the rights of employees in charitable hospitals, the purpose of the Taylor Act, as expressed therein, demonstrates an enlightened approach toward employer-employee relations in this area. Here, as in *Jewish Hosp. of Brooklyn* v. *"John Doe"* (252 App. Div. 581, 586, *supra*), "Both statutes should be read together and reconciled as far as possible in an effort to read the mind of the Legislature."

The majority proffers many reasons why a jury trial may not be appropriate or desirable in this case. Thus, referring in part to the legislative history of an act since repealed, we are told that a jury trial might precipitate "the destruction of a whole city", "endanger the safety of millions", and "produce an epidemic". I do not comprehend how the mere presence of a jury in a criminal contempt case can cause such disaster. However, the reasons advanced by the majority do serve to

3. While section 211 merely refers to section 750 of the Judiciary Law, the Corporation Counsel concedes that subsequent sections were also intended to apply. As the majority quite properly indicates, the order in this case is sought under sections 750 and 751 of the Judiciary Law. It would indeed be overly simplistic reasoning on our part if we were to hold that reference to section 750 meant sections 750 and 751 only, but not sections 750, 751 and 753-a.

bring to mind the knowledgeable words of Mr. Justice HOLMES: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." (*Northern Securities Co.* v. *United States,* 193 U. S. 197, 400.)

Were this case to involve simply a question of statutory construction, it would be unnecessary to go beyond the analysis of the statutory provisions already discussed, since that analysis fairly compels the conclusion that those statutes provide for a jury trial of a criminal contempt alleged to have been committed by public employee unions and their officers. But, an additional issue is raised by the contrary construction of those statutes. The issue is of a constitutional dimension since it involves a purported statutory discrimination between public and private employees in relation to their respective rights to such a jury trial. Initially, it should be emphasized that public employees, qua public employees, are not to be regarded as inhabitants of a constitutional limbo in which they are relegated to a "watered-down version of constitutional rights." (*Garrity* v. *New Jersey,* 385 U. S. 493, 500; *Keyishian* v. *Board of Regents,* 385 U. S. 589.) Furthermore, this proposition remains true even in the face of the dire perils of strikes by public employees. A teacher no more forfeits his constitutional rights when it is alleged that he is engaged in an illegal strike than does any individual citizen forfeit them when it is alleged that he has committed some heinous crime. We harbor no doubts as to the very serious character of the threat to the public inherent in strikes by public employees. It is precisely in times when the public interest is so seriously threatened that courts must heed the caution voiced by Chief Judge CARDOZO: "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' * * * are not to change their form and content in response to the 'hydraulic pressure' * * *, exerted by great causes." (*Matter of Doyle,* 257 N. Y. 244, 268, quoting HOLMES, J., in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401.) Suffice it to say that the issue here is whether the

defendants have a statutory right to a jury trial and the major consideration in arriving at a negative conclusion on that issue is the constitutional infirmity of such a conclusion and the emphasis on the perils of public employee strikes merely serves to becloud the true issue to be resolved here.

Both the United States (14th Amdt.) and the New York State Constitutions (art. I, § 11) provide that no person shall be deprived of the equal protection of the law. Cases too numerous for citation have applied this constitutional mandate in a wide variety of situations and the United States Supreme Court has succinctly stated the applicable criteria: "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended *only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective* * * * A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (*McGowan* v. *Maryland*, 366 U. S. 420, 425–426; emphasis added.) The emphasized portion of that opinion succinctly states the constitutional infirmity flowing from the majority's construction of the statutes so as to deny defendants a right to trial by jury. Although it is true, as the majority states (p. 116), "that a legitimate distinction between public and private employment is constitutionally permissible", it must be borne in mind that a classification which is constitutionally impeccable for one purpose may be constitutionally infirm for another (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150). Thus, a classification of unions and their members in terms of their employment in the public, as against the private, sector may well be reasonably related to a legislative objective of prohibiting strikes which interfere with essential public services. We are here faced, however, not with legislation barring strikes by public employees, but with legislation which, *as construed*, denies a jury trial in a criminal contempt proceeding against public employees arising from the alleged violation of a court order issued in a labor dispute with a governmental employer, but which grants such a jury trial to employees in the private sector who are also charged with violating a court order. Each is charged with the same violation and the fact

that one is employed by the Board of Education, while the other is employed by some private educational system or institution, has no bearing whatever on the procedural method by which his accountability for the alleged violation is to be determined. Is there any governmental interest which requires that the Board of Education employee have his guilt or innocence determined by a Judge without a jury, whereas the employee of the private educational system or institution may have his guilt or innocence determined by a jury? No such interest has been demonstrated in this case and characterizations of the jury-trial process as "long" and "drawn-out" cannot serve to supply such an interest.[4] Furthermore, in terms of the time and circumstances within which it is insisted this legislation must be viewed, it is clear that this is a time when the right to a jury trial is increasingly being recognized as being "fundamental to the American scheme of justice" (*Duncan* v. *Louisiana*, 391 U. S. 145, 149). In view of this, is it reasonable to ascribe to the Legislature an intent to sacrifice such a fundamental aspect of our system of justice to the demands of expedience? So, too, the circumstances of the recent history of public employer-employee labor relations would seem to indicate that the legislators, as practical, realistic men, realized that the very resort to the court and its process in such situations often tends to exacerbate and inflame an already critical situation and has even, in the recent past, itself become a key obstacle to the resolution of such disputes and the re-establishment of the sought-after harmony and co-operation between public employers and their employees. In the face of these facts, is it reasonable to say that the Legislature could reasonably have concluded that the withholding of a right so universally recognized as an integral part of our system of administering justice would *hasten* the end of such public employee labor disputes? The time and the circumstances provide a rather clear-cut answer to that question. The conclusion is inescapable that, in the language of *McGowan* (*supra*), the distinction between public and private employees, in the context of the right to jury trial, is "wholly irrelevant" to the

4. Indeed, at least as to the fine which may be imposed, the Legislature disclaimed any overwhelming desire for swift punishment by providing that it need not be paid until an "appeal is finally determined." (Judiciary Law, § 751, subd. 2, par. [d], cl. [i].)

achievement of the legislative objectives expressed in the Taylor Act. (Cf. the equal protection analysis in *Baxstrom* v. *Herold*, 383 U. S. 107, 111–112.) Indeed, the legislative objectives sought to be achieved by the enactment of the Taylor Act are not difficult to establish since the Legislature saw fit to verbalize its objectives in the statute itself: "The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act *to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of the government.*" (Civil Service Law, § 200; emphasis added.) It is difficult, if not impossible, to conceive of any way in which the *denial* of a jury trial, in a criminal contempt proceeding brought against a public employees' union and its officers and arising from a dispute with a governmental employer, is in any way relevant to or productive of harmony and co-operation or how it could possibly be relevant to the assurance of the orderly and uninterrupted operations and functions of the government. The issue involved goes merely to the *procedure* to be invoked when a labor dispute has already occurred and has resulted in a court order which has allegedly been violated and simply has no bearing whatever on the effectuation or frustration of the expressed legislative objectives. This is particularly apparent when it is recognized that the matter of jury trial arises only *after* events have occurred which necessitate a resort to the court and its mandates in an effort to enforce compliance which has allegedly not been voluntarily forthcoming. Nor is it conceivable that the *denial* of such a right, especially when it is *granted* in criminal contempt proceedings arising from private labor disputes, could effectuate the objectives of harmony and co-operation and uninterrupted government operations in the future. Governmental entities can show no vital or even non-vital interest which will be served by denying these defendants a jury trial. In the face of the obvious lack of relevant connection between the public-private employee distinction as to the right to a jury trial and the objectives sought to be achieved by the legislation of which the denial of a right to jury trial is purportedly a part, there is a rather clear-cut deprivation of the equal protection of the law to which *both* public and private

employees are entitled. It should need no citation of case or treatise to establish the proposition that a particular enactment, at the time it is challenged, either meets or does not meet the requirements of the fundamental document under which it must find its ultimate validity. Either the statutes involved in this case, *as construed*, accord public employees the equal protection of the law or they deprive public employees of such equal protection.

In light of the serious constitutional deprivation of equal protection involved in the majority's construction of these statutes, it is difficult to understand why some rather fundamental canons of statutory construction were apparently ignored in arriving at that construction. While we recognize that the "primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature", we also recognize that "A construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination." (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 147; *Matter of Meyer*, 209 N. Y. 386.) The mere comparison of the respective rights of the public and private employee resulting from the majority's construction amply demonstrates that this canon played no part in that construction. Even more critically in point is the canon which asserts that "statutes must be construed to avoid not only the conclusion that they are unconstitutional, but also to avoid any grave doubts upon that score." (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 150; *Courtesy Sandwich Shop* v. *Port of N. Y. Auth.*, 12 N Y 2d 379, 389; *Matter of Coates*, 9 N Y 2d 242, 253; *Matter of Vanderbilt*, 281 N. Y. 297, 313.) Even assuming, *arguendo*, that the majority's construction of the statutes so as to deny the public employee the right to a jury trial of a criminal contempt is supportable simply as a matter of construction, the resulting constitutional infirmity of that construction requires that the court implement these canons to obviate those infirmities. It is axiomatic that the Judiciary should take great care in ascribing a particular intent to the Legislature in enacting a particular statute. It is equally axiomatic that such care should be redoubled when the intent sought to be ascribed to the Legislature carries with it a burden of unconstitutionality. The lack of such care is

acutely apparent here since there is available to the court a construction which is eminently reasonable, if not compelled, as well as free from constitutional objections.

Since we find that the defendants are entitled to a jury trial under the statutes of this State and since a contrary construction of those statutes raises a grave constitutional question as to the deprivation of the equal protection of the law, we would reverse the orders of the Appellate Division which affirmed the denial of appellants' right to a jury trial.

Accordingly, the orders of the Appellate Division should be reversed and the certified questions should be answered in the affirmative.

KEATING, J. (dissenting). Although I concur in most of Judge BURKE's opinion and would construe the Taylor Law as granting a right to trial by jury here in order to avoid reaching a serious constitutional question (*Kent* v. *Dulles*, 357 U. S. 116), I prefer to rest my dissent primarily on the constitutional mandate involved. In light of the majority's treatment of this point, I find it desirable to outline briefly the basis of my conclusion that, even if the Taylor Law does not provide a right to trial by jury to the appellants, the "equal protection" clause of the Fourteenth Amendment does.

The "equal protection" clause stands as a guardian and protector of minorities of every kind against every form of irrational discrimination. It is manifestly far easier, politically, to pass legislation which touches adversely only a small group. The "equal protection" clause seeks to control this tendency by requiring the Legislature to extend its classification to all persons or groups fairly within the legislative policy. Justice JACKSON in his concurring opinion in *Railway Express* v. *New York* (336 U. S. 106, 112-113) recognized this fundamental purpose of the "equal protection" clause when he wrote: "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation

and thus to escape the political retribution that might be visited upon them if larger numbers were affected."

Later on in the opinion he summarized his views in a particularly apt phrase: "[W]e are much more likely to find arbitrariness in the regulation of the few than of the many" (336 U. S., p. 113). I would examine the issue raised by this appeal in light of Justice JACKSON's analysis of the "equal protection" clause.

In the case upon which the majority rely (*United States* v. *Mine Workers*, 330 U. S. 258, 298), the "equal protection" point was not even raised. Moreover, the case was decided in a day when the importance of the "equal protection" clause, as a vital tool in the preservation of a just society, was only then beginning to be felt.

The question is not whether public employees differ from private employees or whether the former may not strike, while the latter may, but whether the differences between them are pertinent to the subject with respect to which the classification is made, to wit, the right to trial by jury (*Baxstrom* v. *Herold*, 383 U. S. 107, 111). More precisely, the issue here is whether the denial of a jury trial is necessary to the functioning of the Taylor Law. The "one vital reason" offered by the majority to justify the lack of a jury trial requirement, where public employees or their representative organizations are involved, is an alleged need for "Prompt determinations" "in criminal contempt proceedings under the Taylor Law" "unencumbered by the long, drawn-out procedures involved in jury trials" "in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the offenders." (Majority opn., p. 117.) In contrast to almost every other criminal statute, however, the Taylor Law postpones the enforcement of all of its penalties against the union until after all appeals are exhausted (Judiciary Law, § 751, subd. 2, par. [d], cl. [i]). While it is conceivable that the appellate process could terminate prior to the end of the strike, this has yet to happen. Therefore, in the case of the union, the purported justification for denying a jury trial has no application at all.

In the case of the short jail terms provided by the statute as punishment against union leaders, and which can be imposed immediately, it is of crucial significance that, in three major strikes against the City of New York since the Taylor Law

was enacted, the city found it impossible effectively to enforce the short jail sanction to end the strikes.* The same situation prevailed for 20 years under the Condon-Wadlin Act (L. 1947, ch. 391). Therefore, while the Legislature has the right to experiment, we are here dealing with a situation where the reasons offered for drawing the distinction have been shown by historical precedent to have no basis.

When it is remembered that employees of private utilities have the power to plunge one of the great cities of the world into total darkness or complete silence, that employees of privately owned railroads and shipping lines have the power to deprive the residents of that city of vital food and fuel, that private sanitation workers, who carry away a substantial portion of the refuse in New York City, have the power to endanger the health of millions of its inhabitants and that thousands of other workers, carrying out activities vital to the life and safety of the city, may demand a trial by jury if they are charged with violation of a court order restraining a strike, the fallacy in the reasoning which would deny a jury trial to these defendants is readily exposed. References to the dangers to the children from the teachers' strike, real as those dangers may be, are not a substitute for a penetrating analysis of the labels "public" and "private" employees. In my view, the "public"-"private" distinction cannot be maintained as a constitutionally viable difference with respect to the right of a jury trial.

Judges SCILEPPI, BREITEL and JASEN concur with Chief Judge FULD; Judge BURKE dissents and votes to reverse in an opinion in which Judges BERGAN and KEATING concur, Judge KEATING in a separate opinion in which Judges BURKE and BERGAN also concur.

Orders affirmed, etc.

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* The majority opinion argues (n. 2) that in a recent strike in the public sector a union leader was imprisoned for contempt during the course of the strike. What the argument overlooks is that the lack of a jury trial did not speed the end of the strike for in that case as well as others the strikes continued.

Appendix C

(Remittitur of New York Court of Appeals)

No. 410 Form 6

COURT OF APPEALS

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of November in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

Witness,

The Hon. Stanley H. Fuld,
Chief Judge, *Presiding*.

Raymond J. Cannon, *Clerk*.

Remittitur November 21, 1968.

1. No. 410. 68

The City of New York,

Respondent,

vs.

John J. DeLury, Individually &c., & ors., &c.,

Appellants.

Be it Remembered, That on the 23rd day of August in the year of our Lord one thousand nine hundred and

sixty-eight, John J. DeLury, Individually &c., & ors, &c., the appellants in this cause, came here unto the Court of Appeals, by O'Dwyer & Bernstien, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Messrs. Paul O'Dwyer and John J. DeLury, Jr., of counsel for the appellants, and by Mr. Frederic S. Nathan, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs. Question certified answered in the affirmative.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs. Question certified answered in the affirmative, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, and by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, November 21, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

Appendix C-1

(Order of New York Court of Appeals
Re: Remittitur)

State of New York,

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals in the City of Albany on the Eleventh day of December A.D. 1968.

Present:

Hon. Stanley H. Fuld,
Chief Judge, presiding

1

Mo. No. 1265

The City of New York,

Respondent,

vs.

John J. DeLury, Individually &c., & ors., &c.,

Appellants.

An application to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said application be and the same hereby is denied for the reason that the opinion of the Court clearly indicates that the constitutional arguments raised by the appellants were passed upon (*Miller* v. *Miller*, 22 N.Y. 2d 722).

A copy.

S E A L

/s/ Gearon Kimball
Deputy Clerk

Appendix D

(Opinions of New York Supreme Court, Special Term)

Opinion on Conviction of DeLury by Justice Streit

The Court: The statute is very clear and explicit, government employees may not strike against the government. It is also clear, so far as this Court is concerned, and so far as the evidence is concerned, that there was a strike called on the morning of February 2, 1968.

The evidence is also overwhelming that the strike is still in progress. It is devastating strike. It could be very destructive. There is no question about the fact that the union is guilty of violating the Taylor Law.

The question arises now as to whether the defendant DeLury is guilty of contempt, criminal contempt of court, within the meaning of Section 751 of the Judiciary Law.

There is some evidence to the effect that on the morning of February 2nd he made a statement which says, "Your sentiments before was go-go-go. I'd accept a motion for go-go-go (cheers). All in favor signify by saying yes. (cheers) All opposed (boos). I didn't come here to bargain. I took a firm position with the City. I gave the members a final offer of this union. Now I want to show discipline here this morning, or this afternoon. I don't want to show where there is confusion in the members. You got a job at the locations to see that is effective 100 per cent. (cheers)"

This is conceded, though objected to.

Following that, we have the order of Mr. Justice Spiegel on the evening of February 2nd. It is conceded that the defendant DeLury was aware of the order of this Court; and the order directed him, DeLury, an officer and president of the Association, to instruct all members of said Association not to engage in any strike, concerted stoppage of work, or concerted slowdown against the plaintiff.

Appendix D

It is also conceded, and the defendant has indicated that it is unnecessary to come forward with proof by members of the Association, that they did not receive such an instruction.

It is conceded that he did not comply with this order to instruct the members of the Association not to engage in any strike, concerted stoppage of work, or concerted slowdown against the plaintiff.

For whatever influence the president of an association may have, it is his duty to comply with the Court's order when a Court instructs him to tell his men to cease the stoppage. This he has declined to do, and I hold that the evidence shows, beyond a reasonable doubt, that the defendant DeLury is guilty of a wilful contempt of this Court within the meaning of Section 751 of the Judiciary Law. * * * The defendant John DeLury is fined the sum of $250 and sentenced to jail for a period of fifteen days for his wilful disobedience of the Court's mandate."

Opinion on Conviction of Union by Justice Streit

The Court: On Friday, February 2, 1968, Mr. Justice Spiegel signed an order directing the officers and members of the Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters, to refrain from engaging or causing or instigating any strike, concerted stoppage of work; from meeting or taking any action likely to cause any employees to desist from engaging in the performance of their duties; from agreeing, conspiring or combining to perform any acts tending to interfere with the operation of the Department of Sanitation of the City of New York, and the defendant officers of the Uniformed Sanitationmen's Association were directed to instruct all members of said association not to engage in any strike, concerted stoppage of work or concerted slowdown against the plaintiff.

The motion for a temporary injunction was returnable before me on February 5. At 5 p.m. on February 2, coun-

sel accepted service on behalf of the union and its officers. On February 5, the motion for a preliminary injunction was argued before me. It was then conceded that there was a work stoppage by 99 per cent of the 4500 employees who were scheduled to report for duty but failed to appear from 7 a.m. on February 2 until 12:20 p.m. on February 5.

On that morning, I granted a preliminary injunction restraining the union, and its officers, from striking. That same day, Justice Irving Levey signed an order to show cause seeking to punish the union for violation of Judge Spiegel's order of February 2, returnable before me on February 6. I signed an order seeking to punish the officers for violating Judge Spiegel's order, also returnable on February 6. Both of these motions were consolidated. I held a hearing, and after listening to the testimony of Maurice Feldman, the Acting Commissioner of Sanitation; Mr. Jack Bigel, a consultant to the Uniformed Sanitationmen's Association; Dr. Edward O'Rourke, the Commissioner of Health; Inspector Edmond Joyce of the New York Police Department, and Fire Chief John T. O'Hagan; and after a concession that Mr. DeLury did not comply with the order of this Court dated February 2, 1968 to instruct the members of the Association not to engage in any strike or concerted work stoppage, I held Mr. DeLury guilty of criminal contempt and imposed sentence upon him.

On February 7 we continued the hearing to punish the union for violation of Judge Spiegel's order. After hearing Mr. Feldman and Mr. Nathansky, a senior accountant in the Comptroller's Office, we recessed.

On February 8, Justice Irving Levey signed an order, returnable before me on February 9, to show cause why the union should not be punished for violation of my preliminary injunction dated February 5 restraining it from engaging in, causing, instigating, condoning and lending assistance to a strike against the City of New York.

Today the Corporation Counsel has moved to consolidate the two applications: one, for violation of Judge

Spiegel's order dated February 2; and, two, for violation of my order dated February 5 not to engage in any strike. I granted that motion.

The specific charge against the union is that it is guilty of criminal contempt within the meaning of Sections 750 and 751 of the Judiciary Law and Article 14 of the Civil Service Law, in that it failed to comply with the restraining order of February 2 and the temporary injunction of February 5 to refrain from engaging in, causing, instigating or lending support or assistance of any nature to any strike or concerted stoppage of work.

Section 210 of the Civil Service Law is short, clear and concise. It simply says: "No public employee or employee organization shall engage in a strike." Section 201, Subdivision 10, of that law defines it even more simply. It reads: "The term 'strike' means any strike or other concerted stoppage of work or slowdown by public employees."

It is conceded that 99 per cent of the employees, members of the Uniformed Sanitationmen's Association, Local 831, failed to report for duty for the days of February 3, February 4 and February 5. The testimony shows a few hundred appeared on February 7, but that practically no one appeared for work on February 6, 8, 9 or 10 until 8:15 p.m. on the 10th.

It is also conceded that this was a work stoppage. This mass work stoppage was concerted; and I shall not dignify the specious argument that it required preliminary or subsequent action or approval of any of the officers.

As a defense to these charges of criminal contempt for violation of the lawful Court orders and mandates not to strike, the defendant contends, as I understand it, that the City representative, in his negotiations, refused to consider the formula as presented by the witness, Jack Bigel. The defendant further asserts that the City, during all the discussions, insisted on using the formula as it applied to the policemen and firemen, but refused to consider Mr. Bigel's presentation concerning increased production.

Moreover, says the defendant, the City did not take into consideration the increased number of accidents in the Sanitation Department. It also points to the number of conferences that took place between February 2 and February 10 while the union was on strike.

Now, I fail to see how this testimony in any way justifies a willful defiance of Court orders. The statute, Section 751, Subdivision 2(a) does provide that in fixing the amount of the fine and/or the duration of the forfeiture, the Court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to, the extent of the willful defiance, the impact of the strike on the public health, the refusal of the public employer to submit to the mediation and fact-finding procedure provided in Section 209 and whether, if so alleged by the employee organization, the public employer engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike.

Whether we consider Section 751 of the Judiciary Law or Section 210 of the Civil Service Law or whether we consider Local Law 53, as passed by the City Council and the Board of Estimate, effective September 1, 1967, I do not find a scintilla of evidence from which I can infer that the City engaged in any acts of extreme provocation, nor that the union made any efforts to terminate the strike in good faith. Holding negotiations while a willful defiant strike is in progress does not indicate actions in good faith to terminate the strike. On the contrary, I find a willful defiance and resistance of the Court's mandates. I find, also, that the impact of the strike on the public health, safety and welfare of the eight million people of the City of New York was the most severe, most dangerous and, almost, the most disastrous in the history of the City of New York.

Appendix D

I decide and hold now, at the conclusion of the consolidated motions, after a hearing, that the evidence shows beyond a shadow of doubt that the union is guilty of criminal contempt within the meaning of the Judiciary Law and the Civil Service Law and Local Law 53.

A great deal has been said and written by former Presidents of the United States, and former Governors of this State, and students of government concerning the effect of a strike by government employees against the government. To expound and philosophize on this subject at this moment would be a supererogation. But after 31 years on this Bench, it is appropriate that I make a few observations.

It has been a fundamental principle of government that a public employee may not strike against the government. If there were no Condon-Wadlin Act, if there were no Taylor Act, then the common law against such strikes would still apply.

To quote the late Justice Robert Jackson of the United States Supreme Court, "This case presents one of the best examples of one of the worst menaces to American justice." But of far greater significance to this Court and the cause of justice and the violation of this statute, which the Legislature enacted for the benefit of the State and the employees only last year, is the willful and deliberate defiance of the lawful mandates of this Court. If there is one thing that the people are entitled to expect from the civil service employee, to whom it gives life tenure, vacations, sick leave, contributes to his pensions, and the right to bargain collectively, it is respect for the law. In my opinion, our form of government cannot long endure when any group or class of persons are permitted to decide with which laws they shall comply and which they shall flout. More particularly, when the times comes that public employees can strike against the government with impunity, then that is the end of our democracy and the beginning of anarchy.

Appendix D

As was pointed out to me the other day by a prominent lawyer at our conference—his name is Paul O'Dwyer—we each have a duty to perform. And this might be a good occasion to demonstrate the fortitude of the judiciary.

I find that the union has willfully, deliberately and recklessly defied and violated the lawful mandates of this Court, in utter disregard of the health and welfare of the eight million residents of the City of New York. I find, and hold, that the City of New York has adopted Local Law 53 pursuant to Section 212 of the Civil Service Law. This law created the Office of Collective Bargaining in the City of New York, thus exempting the City from the provisions of the Taylor Law concerning the dues check-off, which otherwise would be in the purview of the State Employment Relations Board. Hence, the Court has the power to order a forfeiture of the rights granted pursuant to the provisions of Paragraph (b) of Section 208 of the Civil Service Law.

It is the judgment of this Court that the union be, and it is hereby fined the sum of $80,000; and I hereby decree and direct that this union has forfeited its right to membership dues collections for a period of 18 months and the City is directed accordingly. The motions to dismiss and for judgment are denied.

Appendix E

(New York Laws Involved)

A. New York Constitution, Art. I, § 2

[Trial by jury; how waived.] § 2. Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

B. New York Civil Service Law, Art. 14

* * *

§ 200. Statement of policy.

The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political

subdivisions to negotiate with, and enter into written agreements with employees organizations representing public employees which have been certified or recognized, (c) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (d) continuing the prohibition against strikes by public employees and providing remedies for violation of such prohibition.

§ 201. DEFINITIONS.

* * *

7. The term "government" or "public employer" means (a) the state of New York, (b) a county, city, town, village or any other political subdivision or civil division of the state, (c) a school district or any governmental entity operating a public school, college or university, (d) a public improvement or special district, (e) a public authority, commission, or public benefit corporation, or (f) any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state.

8. The term "public employee" means any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include persons holding positions by appointment or employment in the organized militia of the state for purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article.

* * *

10. The term "strike" means any strike or other concerted stoppage of work or slowdown by public employees.

* * *

Appendix E

§ 202. RIGHT OF ORGANIZATION.

Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.

§ 203. RIGHT OF REPRESENTATION.

Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder.

§ 204. RECOGNITION AND CERTIFICATION OF EMPLOYEE ORGANIZATIONS.

1. Public employers are hereby empowered to recognize employee organizations for the purpose of negotiating collectively in the determination of, and administration of grievances arising under, the terms and conditions of employment of their public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.

2. Where an employee organization has been certified or recognized pursuant to the provisions of this article, the appropriate public employer shall be, and hereby is, required to negotiate collectively with such employee organization in the determination of, and administration of grievances arising under, the terms and conditions of employment of the public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.

* * *

Appendix E

§ 207. DETERMINATION OF REPRESENTATION STATUS.

For purposes of resolving disputes concerning representation status, pursuant to section two hundred five or two hundred six of this article, the board or government, as the case may be, shall

* * *

3. Certify or recognize an employee organization upon the affirmation by such organization that it does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike.

§ 208. RIGHTS ACCOMPANYING CERTIFICATION OR RECOGNITION.

A public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights:

(a) to represent the employees in negotiations and in the settlement of grievances;

(b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees; and

(c) to unchallenged representation status until the next succeeding budget submission date and, thereafter, for an additional period of either twelve months or, if the parties so agree, not less than twelve months nor more than twenty-four months, which period shall commence one hundred twenty days prior to such next succeeding budget submission date.

* * *

Appendix E

§ 210. Prohibition of strikes.

1. No public employee or employee organization shall engage in a strike, and no employee organization shall cause, instigate, encourage, or condone a strike.

2. A public employee who violates the provisions of subdivision one of this section shall be subject to the disciplinary penalties provided by law for misconduct, in accordance with procedures established by law.

* * *

§ 211. Application for injunctive relief.

Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section, and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation. If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law.

§ 212. Local government procedures.

This article, except section two hundred one, section two hundred two, two hundred three, two hundred four,

paragraph (b) of subdivision three of section two hundred seven, section two hundred eight, subdivisions one and two of section two hundred ten, and section two hundred eleven, shall be inapplicable to any government (other than the state or a state public authority) which, acting through its legislative body, has adopted by local law, ordinance or resolution, its own provisions and procedures which have been submitted to the board by such government and as to which there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are substantially equivalent to the provisions and procedures set forth in this article with respect to the state; provided that with respect to the city of New York, such provisions and procedures need not be related to budget submission dates; and provided further, that with respect to provisions and procedures adopted by local law by the city of New York no such submission to or determination by the board shall be required, but such provisions and procedures shall be of full force and effect unless and until such provisions and procedures, or the continuing implementation thereof, are found by a court of competent jurisdiction, in an action brought by the board in the county of New York for a declaratory judgment, not to be substantially equivalent to the provisions and procedures set forth in this article.

C. New York. Judiciary Law

§ 751. PUNISHMENT FOR CRIMINAL CONTEMPTS.

1. Except as provided in subdivision (2), punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the

discretion of the court. Where a person is committed to jail, for the nonpayment of such a fine, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

Such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense.

2. (a) Where an employee organization, as defined in section two hundred one of the civil service law, wilfully disobeys a lawful mandate of a court of record, or wilfully offers resistance to such lawful mandate, in a case involving or growing out of a strike in violation of subdivision one of section two hundred ten of the civil service law, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court in an amount equal to one fifty-second (1/52) of the total amount of annual membership dues of such employee organization or ten thousand dollars whichever is the lesser; provided, however, that where an amount equal to one fifty-second part (1/52) of the total amount of annual membership dues of such employee organization is less than one thousand dollars, such fine may be fixed in the sum of one thousand dollars. In the case of a government exempt from certain provisions of article fourteen of the civil service law, pursuant to section two hundred twelve of such law, the court may, as an additional punishment for such contempt, order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of section two hundred eight of such law, for a specified period of time, as the court shall determine, but in no event to exceed eighteen months; provided, however, that weher a fine imposed

pursuant to this subdivision remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, such forfeiture shall be suspended to the extent necessary for the unpaid portion of such fine to be accumulated by the public employer and transmitted to the court. In fixing the amount of the fine and/or duration of the forfeiture, the court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to: (i) the extent of the wilful defiance of or resistance to the court's mandate (ii) the impact of the strike on the public health, safety, or welfare of the community and (iii) the ability of the employee organization to pay the fine imposed; and the court may consider (i) the refusal of the employee organization or the appropriate public employer, as defined in section two hundred one of the civil srevice law, or the representatives thereof, to submit to the mediation and fact-finding procedures provided in section two hundred nine of the civil service law and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike.

(b) In the event membership dues are collected by the public employer as provided in paragraph (b) of section two hundred eight of the civil service law, the books and records of such public employer shall be prima facie evidence of the amount so collected.

(c) The term "total amount of annual membership dues of the employee organization" as used in paragraph (a) of this subdivision, shall include initiation fees, periodic dues, and all assessments collected by such employee organization in the twelve-month period preceding the contempt attributable to the members of such employee or-

ganization in that part of the collective negotiation unit actually on strike; provided, however, that if such strike effectively prevents the functioning of the entire collective negotiation unit or units represented by such employee organization, it shall mean such fees, dues and assessments attributable to the total number of members of the employee organization in such unit or units.

(d) (i) An employee organization appealing an adjudication and fine for criminal contempt imposed pursuant to subdivision two of this section, shall not be required to pay such fine until such appeal is finally determined.

(ii) The court to which such an appeal is taken shall, on motion of any party thereto, grant a preference in the hearing thereof.

* * *

§ 753-a. CONTEMPTS IN CASES INVOLVING OR GROWING OUT OF LABOR DISPUTES

1. Notwithstanding any inconsistent provision of law, where the alleged contempt is punishable under section seven hundred fifty and/or section seven hundred fifty-three and arises out of any failure or refusal to obey any mandate of a court contained in or incidental to an injunction order granted by such court in any case involving or growing out of a labor dispute, no punishment, prescribed by either of such sections, shall be meted out except after a trial by jury to which the defendant shall be entitled as a matter of right; provided, however, that this section shall not apply to any alleged contempt of such an injunction order committed in the presence of the court.

2. As used in this section and in subdivision three of section 215.50 of the penal law:

Appendix E

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employees or associations of employers; between one or more employers or associations of employers and one or more employers or associations of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involve any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.

(c) A person or association shall be held to a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft or occupation.

Appendix E

D. New York Labor Law

§ 807 * * *

* * *

6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are herein defined) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution for the unlawful acts of individual officers, members, or agents, except upon proof by the weight of evidence and without the aid of any presumptions of law or fact, of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

* * *

10. When used in this section, and for the purpose of this section: (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation, or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; between one or more employers or associations of employers and one or more employers or association of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.

§ 808. CONTEMPT OF INJUNCTION ORDER TO BE TRIED BY JURY

1. Notwithstanding any other provision of law, no person shall be punished either by fine or imprisonment for any alleged contempt arising out of any failure or refusal to obey any mandate of the court contained in or incidental to an injunction order granted by said court in any case involving or growing out of a labor dispute except after a trial by jury to which the defendant shall be entitled as a matter of right; provided, however, that this section shall not apply to any alleged contempt of such an injunction order committed in the presence of the court.

2. As used in subdivision one of this section:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation;

or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; between one or more employers or associations of employers and one or more employers or associations of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined);

(b) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee;

(c) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft, or occupation.